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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

<p>LAWRENCE H. RAY,</p> <p style="text-align: center;">Appellant</p> <p>vs.</p> <p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Appellee</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>NO. 20855</p>
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APPELLANT'S BRIEF

Upon Appeal from the District Court
of the United States
for the District of Arizona

JURISDICTIONAL FACTS

(1) Jurisdiction of the District Court:

18 U. S. C. A., §3231, provides that:

"The District Courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

(2) Jurisdiction of this Court upon Appeal to review the

judgment:

28 U. S. C. A., §1291, reads:

"The Court of Appeals shall have jurisdiction of appeals from all final dispositions of the District Courts of the United States . . . except where a direct review may be had in Supreme Court."

28 U. S. C. A., §1294, reads in part:

"Appeals from the reviewable decisions of the District Courts shall be taken to the Court of Appeals as follows:

"1. From a District Court of the United States to the Court of Appeals for the Circuit embracing the District."

(3) Pleadings necessary to show the existence of jurisdiction:

- (a) The indictment in Case No. C-19396-Tucson;
- (b) The entry of verdict filed November 5, 1965;
- (c) The entry of judgment of guilty and sentencing on November 22, 1965;
- (d) Notice of Appeal.

STATEMENT OF THE FACTS

On September 15, 1965, in Cause No. C-19396-Tucson, by indictment in the United States District Court, Tucson, the defendant was charged with four counts of violation of Title 8 U. S. C. A. §1324 (a) (2) and with four counts of violation of Title

8 U. S. C. A. §1324 (a) (4). On November 3, 1965, the case came to trial on all eight counts.

At the close of defendant's case, defendant moved for a directed verdict of acquittal on three counts of transporting under Title 8 U. S. C. A. §1324 (a) (2) on the ground that the Government had shown no illegal entry. The evidence adduced at trial showed that all of the Mexican Nationals were in fact transported by the defendant in the United States, and further that the defendant promised them employment if they would come into the United States. The evidence further showed that three of the Mexican Nationals (Carmen Chavez-Franco, Celedonio Martinez-Dorame and Antonio Valenzuela-Lopez) had in their possession, at the time they crossed the border into the United States, valid border crossing cards issued under the provisions of 8 C. F. R. 212.6 (a). The evidence further showed that at the time the above named three Mexican Nationals entered the United States, they intended to stay longer than their crossing cards provided and that they intended to work while they were in the United States.

Over objection of counsel, the Court instructed the jury that:

"The rightful holder of a Border crossing card may present the card in lieu of a visa to the Immigration officers at the port of entry when coming directly from Mexico. But the alien's entry into the United States,

if permitted, is subject to and upon condition that his visit in the United States will not exceed in length seventy-two hours. If a holder of a Mexican non-resident alien Border crossing card, when he presents himself and his crossing card to the Immigration officers at the port of entry, actually has the purpose and intention, if permitted into the United States, to remain in the United States in excess of seventy-two hours and he obtains entry into the United States by means of the card, failing to disclose his purpose and intention to the Immigration officers, then such alien upon entry into the United States is in the United States in violation of law and he is a person not lawfully entitled to enter or reside within the United States under the laws and regulations of the United States relating to the immigration and exclusion of aliens."

(Transcript of Proceedings, Page 364, Line 14, through Page 365, Line 7).

Defendant's motion for a directed verdict of acquittal on Counts 1, 2 and 3 was denied. The jury deliberated and returned a verdict of guilty on all eight counts.

SPECIFICATIONS OF ERROR

1. The Court erred in not granting the defendant's motion for a directed verdict of acquittal on Counts 1, 2 and 3 at the close of the defendant's case.

2. The Court erred in instructing the jury:

"The rightful holder of a Border crossing card may present the card in lieu of a visa to the Immigration officers at the port of entry when coming directly from Mexico. But the alien's entry into the United States, if permitted, is subject to and upon condition that his visit in the United States will not exceed in length seventy-two hours. If the holder of a Mexican non-

resident alien Border crossing card, when he presents himself and his crossing card to the Immigration officers at the point of entry, actually has the purpose and intention, if permitted into the United States, to remain in the United States in excess of seventy-two hours and he obtains entry into the United States by means of the card, failing to disclose his purpose and intention to the Immigration officers, then such alien upon entry into the United States is in the United States in violation of law and he is a person not lawfully entitled to enter or reside within the United States under the laws and regulations of the United States relating to the immigration and exclusion of aliens.";

and the Court erred in refusing defendant's Requested Jury Instructions No. 3 and No. 4.

PROPOSITIONS OF LAW

1. Under Title 8 U. S. C. A. §1324 (a) (2), the Government must show that the entry of the aliens at the time of entry was illegal in order to sustain a conviction. Under Title 8 U. S. C. A. §1324 (a) (4), the Government must show that the entry at the time the person entered was illegal.

2. The plea of not guilty put into issue every allegation in each count and put upon the Government the burden of proving every essential element of the offense charged. Penal statutes must be strictly construed, and the defendant's acts must fall plainly within the class of acts denounced.

3. A legal entry into the United States, even though the

person is illegally staying in the United States at a subsequent time, will not sustain a conviction under Title 8 U. S. C. A. §1324 (a) (2) and (4).

ARGUMENT

AS TO SPECIFICATION OF ERROR NO. 1 AND PROPOSITIONS OF LAW NO. 1, NO. 2 and NO. 3:

Title 8, U. S. C. A. §1324 (a) (2) provides:

"(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who-

* * *

"(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;".

An essential element of the offense is that the alien illegally entered the United States. The evidence shows that Carmen Chavez-Franco, Celedonio Martinez-Dorame and Antonio Valenzuela-Lopez had valid crossing cards. Chavez-Franco testified:

"Q Did you have what is called a Border crossing card?

"A That is all I had."

(Transcript of Proceedings, Page 25, Lines 7 and 8).

"Q When did you receive this Border crossing card, do

you remember?

"A I received it about the 29th of October, I believe.

"Q Of what year, sir?

"A In 1964."

(Transcript of Proceedings, Page 25, Lines 17 through 21).

Martinez-Dorame testified:

"A I told him I had no Immigration, that I only had a local crossing card."

(Transcript of Proceedings, Page 57, Lines 2 and 3).

"Q And what is that document, or what is that exhibit which purports to be a Border crossing card?

"A It is what we call a local passport.

"Q Was that the card to which you referred when you spoke to Mr. Ray in your home on the 8th of July?

"A Yes, it is a local card.

"Q Do you remember if you actually showed Mr. Ray this card?

"A No, I didn't show it to him."

(Transcript of Proceedings, Page 58, Lines 1 through 8).

Valenzuela-Lopez testified:

"Q What sort of papers, if any, did you have to come over into the United States?

"A Nothing but a local passport.

"Q Showing you Government's Exhibit 2 for identification, are you able to identify that document?

"A Yes, and this is my picture.

"Q Is that the passport you referred to, your local passport?

"A Yes, it is. It is just to come in."

(Transcript of Proceedings, Page 141, Lines 11 through 19).

The Code of Federal Regulations, Title 8, Chapter 1, Section 212.6 (a), provides:

" . . . A Mexican nonresident alien border crossing card, Form I-186, may be presented as an entry document at a United States port of entry on the Mexican border by a Mexican citizen who seeks to enter the United States for a period of 72 hours or less to visit in the area within 150 miles of the Mexican border. The rightful holder of a valid Form I-186 seeking entry into the United States from Mexico, or from Canada if he has been in no country other than the United States and Canada since leaving Mexico, may apply for admission at any United States port of entry for more than 72 hours or to proceed to areas in the United States outside the 150-mile geographical limitation, or both, and, if admitted, shall be issued a Form I-94."

Therefore, the three above mentioned aliens legally entered the United States. The fact that they did not leave the United States after the time they were permitted to stay had expired would not make their original entry illegal. This Court had occasion to pass upon the question of illegal entry under Title 8, U. S. C. A. §1324 (a) (2) in United States v. Orejel-Tejeda, 194 F. Supp. 140, 142:

"At the time of transportation all of the transported

aliens had been 'duly admitted to the United States by an immigration officer,' and were 'lawfully entitled to enter or reside within the United States' under the appropriate statutes, regulations and treaties. See Title V of the Agricultural Act of 1949, 7 U. S. C. A. §§1461-1468; 8 C. F. R. 214.2 (k). Such aliens had a non-immigration status (8 U. S. C. A. §1101 (a) (15) (H) (ii) and as such were subject to deportation for violations of the conditions of such status. (8 U. S. C. A. §1251 (a) (9)). It was only when the aliens were transported to the Turlock area, which was outside of their permitted area of labor, that they were subject to deportation, and, to that extent, illegally in the United States. It could be argued logically that at the time they were not 'lawfully entitled to reside within the United States' and that defendant, in changing their lawful status by the transportation, came within the proscription of Section 1324. Such an interpretation would be at variance with some cardinal principles of statutory interpretation."

The Court went on to say in its holding:

"This Court concludes that the history of this enactment establishes that Congress intended the phrase 'not entitled to * * * reside' to refer to the time the alien transported entered the United States. The congressional history is not crystal clear, but it is certainly persuasive; however, coupled with the usual rule that criminal statutes are to be strictly construed in favor of defendant, it supports the conclusion that Section 1324 (a) (2) of Title 8 U. S. C. A. does not proscribe the conduct of defendant herein."

In the above cited case, the defendant was indicted on eight counts of transporting alien farm laborers. These laborers were in the United States under valid farm labor permits under Title V of the Agricultural Act of 1949, U. S. C. A., §§1461-1468, but their permits allowed them to work only in the southern district of California and not in any other part of the United States.

The evidence showed that the defendant knew that the aliens were not allowed to work out of the southern district of California, and that he transported them to Turlock, California, for a profit; but as previously cited, the Court held that the entry into the United States was legal and even though the aliens remained illegally, the defendant could not be convicted under 8 U. S. C. A. §1324 (a) (2).

After discussing the legislative history of the above mentioned statute, the Court said:

"The report also states that the purpose of the legislation was 'to strengthen the law generally in preventing aliens from entering or remaining in the United States illegally. In this context it would seem that 'remaining' refers to remaining in the country after illegal entry. A careful reading of the whole legislative history, while not conclusive, would seem to support this conclusion."

It is well established that a plea of not guilty puts the burden of proof upon the prosecution to prove all elements of the offense. In United States v. Waters, 73 F. Supp. 72, 73, it was said:

"The burden rests upon the prosecution to establish the guilt of each element of an offense."

In Prettyman v. United States, 180 Fed. 30, 42, it was said:

"The plea of not guilty put in issue every allegation in the count, and put upon the Government in its ablest way the burden of proving every essential element of the offense charged."

AS TO SPECIFICATION OF ERROR NO. 2 AND PROPOSITIONS OF LAW NO. 1, NO. 2 AND NO. 3:

Title 8, U. S. C. A. §1324 (a) (2) and (4) provide:

"(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who-

* * *

"(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;"

* * *

"(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of-

"any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, . . ."

Upon examination of the statute, it would appear that an essential requirement for conviction is that the alien illegally entered the United States. The words "not duly admitted by an immigration officer or not lawfully entitled to enter" would seem to support that conclusion, and therefore, Title 8 U. S. C. A. §1324 (a) (2) and (4), as interpreted by this Court in United States v. Orejel-Tejeda, 194 F. Supp. 140, would mean that if the aliens entered the United States legally, the defendant could not

be convicted of a violation of 8 U. S. C. A. §1324 (a) (2) and (4). The Court in that case said:

"This Court concludes that the history of this enactment establishes that Congress intended the phrase 'not entitled to * * * reside' to refer to the time the alien transported entered the United States. The congressional history is not crystal clear, but it is certainly persuasive; however, coupled with the usual rule that criminal statutes are to be strictly construed in favor of defendant, it supports the conclusion that Section 1324 (a) (2) of Title 8 U. S. C. A. does not proscribe the conduct of defendant herein."

The evidence shows that Carmen Chavez-Franco, Celedonio Martinez-Dorame and Antonio Valenzuela-Lopez had valid crossing cards. Chavez-Franco testified:

"Q Did you have what is called a Border crossing card?

"A That is all I had."

(Transcript of Proceedings, Page 25, Lines 7 and 8).

"Q When did you receive this Border crossing card, do you remember?

"A I received it about the 29th of October, I believe.

"Q Of what year, sir?

"A In 1964."

(Transcript of Proceedings, Page 25, Lines 17 through 21).

Martinez-Dorame testified:

"A I told him I had no Immigration, that I only had a

local crossing card."

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"Q And what is that document, or what is that exhibit which purports to be a Border crossing card?

"A It is what we call a local passport.

"Q Was that the card to which you referred when you spoke to Mr. Ray in your home on the 8th of July?

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"A No, I didn't show it to him."

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Valenzulea-Lopez testified:

"Q What sort of papers, if any, did you have to come over into the United States?

"A Nothing but a local passport.

"Q Showing you Government's Exhibit 2 for identification, are you able to identify that document?

"A Yes, and this is my picture.

"Q Is that the passport you referred to, your local passport?

"A Yes, it is. It is just to come in."

(Transcript of Proceedings, Page 141, Lines 11 through 19).

It is a well established rule of law that penal statutes should be strictly construed, and that the acts of the defendant

ust fall plainly within the class of acts denounced in the statute. United States v. Orejel-Tejeda, 194 F. Supp. 140, states:

"The first basic principle to be observed is that Section 1324 is a penal statute, and, therefore, is to be strictly construed."

Spector v. United States, 42 F. 2d 937, 941, states:

"A penal statute which creates a new crime and prescribes its punishment must clearly state the persons and acts denounced. A person who, or an act which, is not by express terms of the law clearly within the class of persons, or within the class of acts, it denounces will not sustain a conviction thereunder. One ought not to be punished for a new offense unless he and his act fall plainly within the class of persons or the class of acts condemned by the statute. An act which is not clearly an offense by the expressed will of the legislative department before it was done may not be lawfully or justly made so by construction after it is committed, either by the interpolation of expression or by the expunging of some of its words by the judiciary."

When the Court in this case instructed the jury that:

"The rightful holder of a Border crossing card may present the card in lieu of a visa to the Immigration officers at the port of entry when coming directly from Mexico. But the alien's entry into the United States, if permitted, is subject to and upon condition that his visit in the United States will not exceed in length seventy-two hours. If a holder of a Mexican non-resident alien Border crossing card, when he presents himself and his crossing card to the Immigration officers at the port of entry, actually has the purpose and intention, if permitted into the United States, to remain in the United States in excess of seventy-two hours and he obtains entry into the United States by means of the card, failing to disclose his purpose and intention to the Immigration officers, then such alien upon entry into the United States is in the United States in violation of law and he is a person not lawfully entitled

to enter or reside within the United States under the laws and regulations of the United States relating to the immigration and exclusion of aliens."

the Court was in a sense telling the jury that a person could be convicted under 8 U. S. C. A. §1324 (a) (2) and (4) if the entry was constructively illegal. Such a conclusion would be in variance with the statute which, as cited above, must be strictly construed. If what the Court instructed the jury was the law, then a defendant's conviction would depend on the secret intent of the alien. If, for instance, the alien at the time he crossed the border intended to stay in the United States, but the defendant was unaware of such intention, under the above instruction he could still be found guilty; but if the defendant intended at the time the aliens crossed that they stay and work for him for a period exceeding seventy-two hours, but the aliens had no intention of working at all or staying longer than seventy-two hours, then under the above instruction, their entry would be legal and the defendant could not be found guilty under the statute.

In construing the portion of the statute with reference to whether the alien was lawfully entitled to enter or reside in the United States, the Court in United States v. Orejel-Tejeda, 194 F. Supp. 140, said:

"At the time of transportation all of the transported aliens had been 'duly admitted to the United States by

an immigration officer,' and were 'lawfully entitled to enter or reside within the United States' under the appropriate statutes, regulations and treaties. See Title V of the Agricultural Act of 1949, 7 U. S. C. A. §§1461-1468; 8 C. F. R. 214.2 (k). Such aliens had a non-immigration status (8 U. S. C. A. §1101 (a) (15) (H) (ii) and as such were subject to deportation for violations of the conditions of such status. (8 U. S. C. A. §1251 (a) (9)). It was only when the aliens were transported to the Turlock area, which was outside of their permitted area of labor, that they were subject to deportation, and, to that extent, illegally in the United States. It could be argued logically that at the time they were not 'lawfully entitled to reside within the United States' and that defendant, in changing their lawful status by the transportation, came within the proscription of Section 1324. Such an interpretation would be at variance with some cardinal principles of statutory interpretation."

Although the Court had no occasion in this case to rule upon U. S. C. A. §1324 (a) (4), it would appear that the interpretation of illegal entry would have to be the same for (4) as it was for (2), and therefore the same rule would apply to one as well as the other.

It is well established that a plea of not guilty puts the burden of proof upon the prosecution to prove all elements of the offense. In United States v. Waters, 73 F. Supp. 72, 73, it was said:

"The burden rests upon the prosecution to establish the guilt of each element of an offense."

In Prettyman v. United States, 180 Fed. 30, 42, it was said:

"The plea of not guilty put in issue every allegation in the count, and put upon the Government in its ablest

way the burden of proving every essential element of the offense charged."

The defendant's Requested Jury Instructions No. 3 and No. 4 adequately stated the law with reference to the elements of the crime. Although it is felt by counsel for the defendant that the Court also adequately stated the law with reference to the elements of the crime, it is also felt that the Court's error was in its instruction as to what constitutes an illegal entry as hereinbefore quoted.

CONCLUSION

1. The defendant submits that because of the Court's failure to grant a directed verdict for the defendant on Counts 1, 2 and 3 on motion of counsel, the conviction should be reversed as to said counts.

2. Because the Court instructed the jury that:

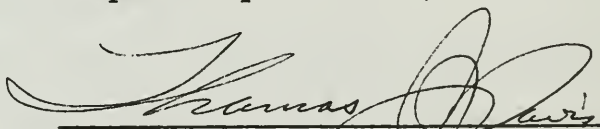
"The rightful holder of a Border crossing card may present the card in lieu of a visa to the Immigration officers at the port of entry when coming directly from Mexico. But the alien's entry into the United States, if permitted, is subject to and upon condition that his visit in the United States will not exceed in length seventy-two hours. If the holder of a Mexican non-resident alien Border crossing card, when he presents himself and his crossing card to the Immigration officers at the port of entry, actually has the purpose and intention, if permitted into the United States, to remain in the United States in excess of seventy-two hours and he obtains entry into the United States by means of the card, failing to disclose his purpose and intention to

the Immigration officers, then such alien upon entry into the United States is in the United States in violation of law and he is a person not lawfully entitled to enter or reside within the United States under the laws and regulations of the United States relating to the immigration and exclusion of aliens."

and refused the defendant's Requested Jury Instructions No. 3 and No. 4, the conviction on Counts 1, 2, 3, 4, 5, and 6 should be reversed and this Court should direct the trial court to enter a judgment of acquittal on said counts notwithstanding the verdict.

In view of the foregoing, defendant submits that the law requires a reversal of the trial court and a direction to enter judgment of not guilty on the grounds that the evidence does not support a conviction of the offenses charged.

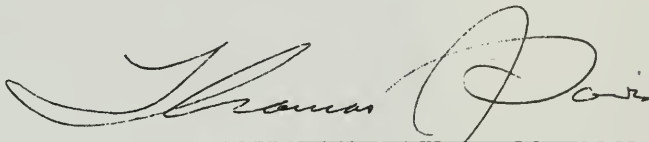
Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Thomas J. Davis", written over a horizontal line.

THOMAS J. DAVIS
Attorney for Appellant
1008 Phoenix Title Building
Tucson, Arizona

CERTIFICATE AS TO RULES 18 AND 19

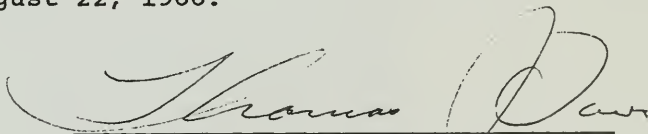
I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.



THOMAS J. DAVIS
Attorney for Appellant
1008 Phoenix Title Building
Tucson, Arizona

PROOF OF SERVICE

I do hereby certify that I caused three copies of Appellant's Brief to be served upon the United States Attorney, Federal Building, Tucson, Arizona, on August 22, 1966.



THOMAS J. DAVIS
Attorney for Appellant
1008 Phoenix Title Building
Tucson, Arizona

